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# In the Supreme Court of the United States

OCTOBER TERM, 1965

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Nos. 59, 60

UNITED STATES OF AMERICA, APPELLANT

*v.*

CECIL RAY PRICE, ET AL.

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*APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION*

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinions of the district court (R. 4–7, 18–25) are not yet reported.

### JURISDICTION

The judgments of the district court dismissing one indictment in its entirety as to all appellees (R. 8) and three counts of a second indictment as to fourteen of the appellees (R. 26–28) were entered on March 2, 1965. Notices of appeal to this Court were filed on the same day (R. 9–10, 28–29). On April 26, 1965, the Court entered an order postponing further consideration of the question of jurisdiction and consolidating these appeals (R. 30). The jurisdiction of this Court to review the decision of the district court on direct

appeal is conferred by 18 U.S.C. 3731. *United States* v. *Braverman*, 373 U.S. 405; *United States* v. *Hvass*, 355 U.S. 570.[1]

## QUESTIONS PRESENTED

1. Whether the right, secured by the Fourteenth Amendment, not to be deprived of life or liberty without due process of law by persons acting under color of State law is a "right or privilege secured * * * by the Constitution" within the meaning of Section 241 of the Criminal Code.

2. Whether private individuals who act in association with public officials to carry out a scheme to deprive persons of rights protected by the Fourteenth Amendment are within the reach of Section 242 of the Criminal Code.

## STATUTES INVOLVED

18 U.S.C. 241 provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise

[1] The jurisdiction of this Court to entertain the direct appeal in No. 60 is not affected by the fact that Counts 2, 3 and 4 were dismissed only as to some of the defendants. See, *e.g.*, *United States* v. *Wise*, 370 U.S. 405; *United States* v. *Woodson*, 371 U.S. 12. The objections to jurisdiction interposed in response to the government's jurisdictional statement—all without substance—are discussed in note 4, *infra*, pp. 8–9.

or enjoyment of any right or privilege so secured—

They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

18 U.S.C. 242 provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

## STATEMENT

On January 15, 1965, the United States grand jury for the Southern District of Mississippi returned two indictments (R. 1–2, 11–16), each charging the same

eighteen persons [2] with offenses against the civil rights of Michael Henry Schwerner, James Earl Chaney and Andrew Goodman, who were killed during the summer of 1964 in the vicinity of Philadelphia, Mississippi. Three of the defendants (Rainey, Price and Willis) were alleged to be State law enforcement officers then "acting by virtue of [their] official positions and under color of the laws of the State of Mississippi". There is no claim that the remaining defendants held public office.

1. The indictment in No. 59 (R. 1–2) involves a single count charging all the defendants with a criminal conspiracy in violation of 18 U.S.C. 241. It alleges that, between stated dates in 1964, the eighteen named persons (R. 2)—

> * * * conspired together, with each other and with other persons to the Grand Jury unknown, to injure, oppress, threaten and intimidate Michael Henry Schwerner, James Earl Chaney and Andrew Goodman, each a citizen of the United States, in the free exercise and enjoyment of the right and privilege secured to them by the Fourteenth Amendment to the Constitution of the United States not to be deprived of life or liberty without due process of law by persons acting under color of the laws of Mississippi.

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[2] James E. Jordan, one of the defendants charged in the two indictments, was not before the district court and is not affected by the rulings below or the present appeals. His case was transferred to the United States District Court for the Middle District of Georgia under Rule 20, F.R. Cr. P.

The indictment further alleges the means by which the defendants planned to achieve the objects of their conspiracy.

The district court dismissed the indictment in its entirety, as to all defendants, on the ground that it did not state an offense against the United States (R. 8). Invoking an alternative ground of the ruling in *Williams* v. *United States*, 179 F. 2d 644 (C.A. 5), affirmed, in part on other grounds, 341 U.S. 70, the court held that Section 241 of the Criminal Code vindicates only "federally created rights", and does not embrace the Fourteenth Amendment right set forth in the indictment (R. 4–7).

2. The indictment in No. 60 (R. 11–16) is in four counts, each of which names all eighteen defendants. Count 1—which was sustained as to all defendants and is not in issue here—charges a violation of 18 U.S.C. 371 by conspiring to commit offenses defined in 18 U.S.C. 242. The present appeal is directed to the partial dismissal of Counts 2, 3 and 4, which charge substantive violations of Section 242.

The three substantive counts are identical, except that each involves a different victim. Thus, Count 2 (R. 13–14) charges that the several defendants—

> * * * while acting under color of the laws of the State of Mississippi, did wilfully assault, shoot and kill Michael Henry Schwerner, an inhabitant of the State of Mississippi, then and there in the custody of Cecil Ray Price, for the purpose and with the intent of punishing Michael Henry Schwerner summarily and without due process of law and for the purpose and

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with the intent of punishing Michael Henry Schwerner for conduct not so punishable under the laws of Mississippi, and did thereby wilfully deprive Michael Henry Schwerner of rights, privileges, and immunities secured and protected by the Constitution and the laws of the United States, namely, the right not to be deprived of his life and liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Mississippi and its agents and officers, the right and privilege to be immune from summary punishment without due process of law, and the right to be tried by due process of law for an alleged offense and, if found guilty, to be punished in accordance with the laws of the State of Mississippi.

The district court granted motions to dismiss Counts 2, 3 and 4 as to all the private defendants (while denying similar motions with respect to the three defendants who are law enforcement officers) (R. 26–28). The court read Section 242 as reaching only the acts of public officers while acting officially. In the court's view, no offense was stated against the private defendants because it was "not charged as an ultimate fact that [any of them] did anything as an official" or that the "individual defendants were officers in fact, or defacto in anything allegedly done by them 'under color of law' " (R. 19–20).

## ARGUMENT

### INTRODUCTION AND SUMMARY

These cases rest on a charge that the eighteen defendants—three of them State officials acting under color of their offices—jointly conceived and executed a plan against three citizens of the United States and inhabitants of Mississippi, then in State custody, that they be released, intercepted, assaulted and murdered. It is alleged that these acts violated rights guaranteed to the victims by the Due Process Clause of the Fourteenth Amendment and the defendants were accordingly indicted for entering into a conspiracy punishable under Section 241 of the Criminal Code (No. 59), and, in a second indictment (No. 60), for conspiring to violate Section 242 (Count 1) and for committing the substantive crime there defined as to each victim (Counts 2, 3 and 4).

On this appeal, there can be no question that a violation of the Fourteenth Amendment—at least by the three official defendants—has been adequately charged. Nor is it debatable that the Due Process rights described in the indictments have been sufficiently "made definite by decision or other rule of law" to support a criminal prosecution against those charged with "willfully" invading them. See *Screws* v. *United States,* 325 U.S. 91, 103; *Williams* v. *United States,* 341 U.S. 97, 101–102. So much is unchal-

lenged.[3] Indeed, those matters are foreclosed by the decision below sustaining the conspiracy count of the indictment under Section 242 and, with respect to the three State officers, the substantive charges of violating the same statute. Finally, there is no question as to the technical sufficiency of either indictment. The rulings below point out no pleading defect of that kind; they were squarely based on a construction of the statutes involved[4] and, in the circum-

[3] The indictment alleges more than ordinary murder for personal reasons by a group of individuals, some of whom happened to be holding State office. Not only is it alleged that the State law enforcement officers were acting under color of their office (R. 1, 11), but the charge is that they used their official powers to release State prisoners and turn them over to a lynch mob, which one of the officers shielded by his presence, with a view that they be summarily punished without benefit of trial (see R. 2, 12, 14, 14–15, 15–16). Thus, the case is plainly within the rule announced in *Screws* and the third *Williams* decision. That the death of the victims was the ultimate consummation of the conspiracy does not put in doubt the applicability of Section 242 is settled by *Screws*. The same question with respect to Section 241 (assuming it protects Fourteenth Amendment rights) is settled by *Logan* v. *United States*, 144 U.S. 263.

[4] There is accordingly no doubt about the jurisdiction of this Court to entertain the government's appeal. To be sure, the court below noted that the indictment in No. 59 alleged that the three State officers charged were "each acting at all times under 'color of laws'", whereas "[t]he statute mentions nothing about 'color of law' in the description of the crime embraced" (R. 4). But the suggestion that the court was pointing to a pleading defect and dismissed the indictment partly on that ground is frivolous. At worst, the allegation is surplusage which would support a motion to strike. F.R. Cr. P., Rule 7(d). In any event, it is plain the court was quarreling, not with

stances, no other issue is open on this direct appeal. See *United States* v. *Borden Co.*, 308 U.S. 188, 193; *United States* v. *Hvass*, 355 U.S. 570, 574. Only two questions remain:

1. The first is whether Section 241 reaches the invasion of rights guaranteed by the Due Process Clause of the Fourteenth Amendment. If so, dismissal of the indictment in No. 59 must be reversed. No interpretation of the Constitution is required to sustain that charge. Three of the accused are State officials, alleged to have acted under color of their offices. They, of course, have the capacity directly to violate the Fourteenth Amendment. The others

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the wording of the indictment, but its theory—that Section 241 reaches Fourteenth Amendment rights.

Nor does the trial court's comment that the substantive counts of the indictment in No. 60 do not charge that the private defendants were "officers in fact, or de facto in anything allegedly done by them 'under color of law'" (R. 20) amount to a holding that the indictment was technically deficient in this respect. We are not questioning the court's reading of the indictment; our appeal is from the ruling that persons without official status are never amenable to Section 242, no matter how involved they may be in the crime of State officers. The answer to that question depends upon a construction of the substantive statute (read in the light of the Fourteenth Amendment) or of the aider or abettor statute (18 U.S.C. 2).

Finally, there is no merit to the suggestion that the direct appeal in No. 60 is defeated by the failure to plead the "aider and abettor" statute, 18 U.S.C. 2, which is now relied upon to sustain the substantive charges against the private defendants. It is well settled that an aider and abettor, made a principal by 18 U.S.C. 2, may be indicted as a principal. *Jin Fuey Moy* v. *United States*, 254 U.S. 189; *Nye & Nissen* v. *United States*, 168 F. 2d 846 (C.A. 9), affirmed, 336 U.S. 613.

are charged as co-conspirators who joined in a scheme to deprive the victims of their right "not to be summarily punished without due process of law by persons acting under color of the laws of the State of Mississippi" (R. 12). In No. 59, it does not matter whether or not they are themselves viewed as having acted "under color of law," for the only charge here is one of conspiracy and it is settled that a "person may be guilty of conspiring although incapable of committing the objective offense." *United States* v. *Rabinowich*, 238 U.S. 78, 86; *Gebardi* v. *United States*, 287 U.S. 112, 121; *United States* v. *Holte*, 236 U.S. 140, 145. See, also, *United States* v. *Trierweiler*, 52 F. Supp. 4 (E.D. Ill.). Indeed, the court below so ruled with respect to the conspiracy count under Section 242 in No. 60, and the same principle obviously applies to Section 241 if it also reaches invasion of Fourteenth Amendment rights.

To repeat, the only question in No. 59 is one of statutory construction: Whether rights guaranteed by the Due Process Clause of the Fourteenth Amendment (and made specific by decisions of this Court) are "right[s] or privilege[s] secured * * * by the Constitution" within the meaning of Section 241. We answer that question in the affirmative on the basis of the language of the statute, its context, and its legislative history. Because the text itself, in its historical setting, so naturally lends itself to that reading, the principal burden of our argument on this point is a rebuttal of the several considerations recently summoned against such a construction.

2. The other issue arises only in No. 60—with respect to the dismissal of the substantive charges laid under Section 242 against the defendants without official status. Counts 2, 3 and 4 of the indictment allege that fifteen private persons, together with three State officials, committed the offense defined in Section 242. Although they were all formally described as "acting under color of the laws of the State of Mississippi" (R. 13–14, 14, 15), the court below correctly noted that "[t]he indictment states that three of the defendants were acting as officers in all that they did, but then does not state or indicate that any of the other individual defendants were officers in fact, or de facto in anything allegedly done by them 'under color of law'" (R. 20). The question is whether such private persons can be prosecuted under Section 242 when they act in association with State officials.

We present two answers to the ruling. First, we argue that the close association alleged between the private defendants and the State officials charged with them makes all of them amenable to the statute as persons acting "under color of law," albeit those without official status do not become de facto officers. Alternatively, we urge that the private defendants, even if incapable of violating the statute on their own in the circumstances of this case, are properly indicted as aiders and abettors of persons with capacity to commit the offense.

## I

### SECTION 241 OF THE CRIMINAL CODE PROTECTS RIGHTS SECURED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The question whether Section 241 punishes conspiracies directed against Fourteenth Amendment rights was fully canvassed in this Court less than fifteen years ago in *United States* v. *Williams,* 341 U.S. 70, and the two major opinions in that case fully explored the arguments on each side of the issue. Against that background one hesitates to rehearse the considerations involved once again. If we do so briefly it is only because, on that occasion, the Court divided evenly and did not resolve the question—four Justices, in an opinion by Mr. Justice Frankfurter, expressing their view that Fourteenth Amendment rights were not within the scope of Section 241 (341 U.S. at 71–82), four other Justices, in an opinion by Mr. Justice Douglas, reaching the opposite conclusion (*id.* at 87–96), and Mr. Justice Black voting to affirm dismissal of the charge on independent grounds (*id.* at 85–86). Inevitably, our discussion will track much of the opinion of Mr. Justice Douglas in that case and will attempt to answer the objections raised by the opinion of Mr. Justice Frankfurter.

Section 241, among other things, punishes "persons" who conspire to interfere with the exercise or enjoyment by a "citizen" of "any right or privilege secured to him by the Constitution or laws of the United States." On its face, the provision is certainly broad enough to reach conspiracies directed against

Fourteenth Amendment rights, and its enactment less than two years after the ratification of that Amendment—as Section 6 of the Enforcement Act of 1870 (16 Stat. 140, 141)—would naturally support that inference. There is a heavy burden, it seems to us, on those who would encumber the straightforward text with a restrictive gloss to the effect that Section 241 does not protect all federal constitutional rights, including he rights then recently declared by the post-War Amendments.

The situation might be different if the narrow reading given Section 241 by the court below derived from a venerable tradition initiated by judges who were immediately familiar with the enactment of the provision. But that is not the case. Indeed, until *Williams,* there seems to have been no doubt expressed on the point. As Mr. Justice Douglas there noted (341 U.S. at 92–93), the early lower federal courts had taken it for granted that Section 241 covered Fourteenth Amendment rights. See *United States* v. *Hall,* 26 Fed. Cas. 79 (S.D. Ala); *United States* v. *Mall,* 26 Fed. Cas. 1147 (S.D. Ala.); *Ex parte Riggins,* 134 Fed. 404 (N.D. Ala.). And this Court had implied as much. There were first a series of cases involving prosecutions of private individuals under Section 241 for alleged violations of Fourteenth Amendment rights which were decided on constitutional grounds—presumably on the premise that the statute reached violations of the Amendment and that it was necessary to determine the scope of the constitutional provision.

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See, *e.g.*, *United States* v. *Cruikshank*, 92 U.S. 542; *Hodges* v. *United States*, 203 U.S. 1; *United States* v. *Wheeler*, 254 U.S. 281. Then came the decision in *Guinn* v. *United States*, 238 U.S. 347, where, in a case involving a congressional election, the Court upheld a prosecution under Section 241 which seems to have rested wholly on an alleged violation of the Fifteenth Amendment—which is no more within the scope of the statute than the Fourteenth Amendment if the restrictive view espoused in *William* is correct. On the same day, in *United States* v. *Mosley*, 238 U.S. 383, 387–388, the Court, speaking through Mr. Justice Holmes, characterized the "sweeping general words" of Section 241 as dealing "with Federal rights and with all Federal rights," "in the lump." The "broad language of the statute" was again noticed in *United States* v. *Classic*, 313 U.S. 299, and (albeit no Fourteenth Amendment rights were involved), the Court seems to have assumed that Section 241 (then § 19), like Section 242 (then § 20), protects all constitutional rights. And, as late as *Screws* v. *United States*, 325 U.S. 91— where the Court explicitly ruled that Section 242 protects rights guaranteed by the Due Process Clause of the Fourteenth Amendment—no one took issue with Mr. Justice Rutledge's statement that there are "no differences in the basic rights guarded" by Sections 241 and 242. *Id.* at 119. As Mr. Justice Douglas has fully shown (341 U.S. at 93–94), that decision also set at rest the objection that Section 241 must necessarily fail as unduly vague if construed to encompass Fourteenth Amendment rights.

Obviously the suggested limited scope of Section 241 does not appear on the surface—else three generations of judges would not have overlooked it until 1950. Accordingly, we must look on the words more critically and carefully assess them in their context. And, lest the true meaning lie buried still deeper, we must attempt to elucidate the sparse legislative history of the provision.

### A. THE TEXT AND CONTEXT OF SECTION 241

The most convenient method for the initial inquiry is to parse Section 241, phrase by phrase, focusing on the restrictive implications attributed to each (by four of the Justices) in *Williams*.

1. *"Persons."* It has been suggested that characterization of the offenders under Section 241 as mere "persons" implies private individuals, acting on their own, rather than State officials or persons acting "under color of law," and that the provision therefore does not encompass Fourteenth Amendment rights which only those wielding State power can invade. See 341 U.S. at 76–78. The term "persons" was designedly used, it is said, to reach the members of the Ku Klux Klan, the acknowledged object of Senator Pool who wrote the provision in question. See *United States* v. *Mosley,* 238 U.S. 383, 387. The significance of that usage is further illumined—so goes the argument—when one notices that other provisions of the 1870 Act (where our provision originated as Section 6) carefully delineated the scope of coverage. Thus, Sections 2 and 3 of that Act were directed to "persons or officers" (16 Stat. 140) and

Section 17, now 18 U.S.C. 242, reached only "person[s] [acting] under color of * * * law" (16 Stat. 144).[5] The suggestion apparently is that there is a purposeful symmetry, dividing the measure into three neat categories of provisions—those which cover only governmental action, those which reach only private acts, and, finally, those which encompass both—and that all of this is confused, with resulting overlapping, if the modern Section 241 is not confined to rights which are secured by the federal Constitution or laws against private invasion.

Perhaps the short answer is that the entire argument is constructed upon the false premise that Congress can never reach invasion of Fourteenth Amendment rights by private persons. As we elaborate in *United States* v. *Guest*, No. 65, this Term, this was certainly not the assumption of those who wrote Section 241, nor do we think it a correct statement of constitutional law. But we do not rest there. Even accepting the proposition that all legislation under the Fourteenth Amendment must speak directly to the State or those acting under its authority, the argument derived from the use of the unqualified word "persons" in Section 241 does not hold up.

First, it is well settled that Section 241 reaches both private and public action—offenses of mere individuals acting on their own (*e.g.*, *Ex parte Yarbrough*, 110 U.S. 651; *United States* v. *Waddell*, 112 U.S. 76; *Logan* v. *United States*, 144 U.S. 263; *In re Quarles*,

[5] In the codification of Section 17 as Section 20 of the Criminal Code of 1909 (35 Stat. 1092), "person" became "whoever" and that change has been retained.

158 U.S. 532; *Motes* v. *United States*, 178 U.S. 458), and acts of State officials acting "under color of law." *E.g., Guinn* v. *United States*, 238 U.S. 347; *United States* v. *Mosley*, 238 U.S. 383; *United States* v. *Classic*, 313 U.S. 299; *United States* v. *Saylor*, 322 U.S. 385. That is an end of the distinction between the provisions of the 1870 Act which are directed solely against non-governmental action and those which encompass both officials and other wrongdoers. Section 241 has precisely the same scope as if it were explicitly addressed to "persons or officers."

Once that flaw is uncovered, the whole complicated edifice built upon the choice of the word "persons" falls of its own weight. If State officials are within the statutory coverage, we can no longer rely on Senator Pool's preoccupation with the Klan as implying an intention to restrict the provision to private conspiracies. Nor does fear of overlapping among the several provisions of the Enforcement Act of 1870 deter us, for, whether or not § 241 protects Fourteenth Amendment rights, overlapping is now inevitable with respect to the invasion of civil rights by State officials. See, *e.g., United States* v. *Classic, supra.* We need merely answer with Mr. Justice Holmes, speaking for the Court in *United States* v. *Mosley, supra,* 238 U.S. at 387: "Any overlapping that there may have been might well have escaped attention, or if noticed have been approved."

To be sure, there subsists a difference between the coverage of Section 241, which encompasses both private and official offenders, and Section 242, which reaches only persons acting "under color of any law,

statute, ordinance, regulation, or custom." These opening words of Section 242 were deemed appropriate (or necessary) when the provision (originally Section 17 of the Enforcement Act of 1870) protected only a limited category of Fourteenth Amendment equal protection rights.[6] But, of course, it does not

[6] As already noted, Section 242 derives from Section 17 of the Enforcement Act of 1870 (16 Stat. 144). In relevant part, that provision punished deprivations of "any right secured or protected" by Section 16 of the Act, which, in turn (tracking the language of the Civil Rights Act of 1866), guaranteed "all persons within the jurisdiction of the United States * * * the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens."

The subsequent history of the provision is traced by Mr. Justice Rutledge in his concurring opinion in *Screws* v. *United States*, 325 U.S. 91, 120:

"At first §20 [now §242] secured only rights enumerated in the Civil Rights Act. The first ten years brought it, through broadening changes, to substantially its present form. Only the word 'willfully' has been added since then, a change of no materiality, for the statute implied it beforehand. 35 Stat. 1092. The most important change of the first decade replaced the specific enumeration of the Civil Rights Act with the present broad language covering 'the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States.' R.S. 5510. This inclusive designation brought §20 into conformity with §19's [now §241] original coverage of 'any right or privilege secured to him by the Constitution or laws of the United States.' Since then, under these generic designations, the two have been literally identical in the scope of the rights they secure. The slight difference in wording cannot be one of substance."

For the full text of each of the successive versions of Section 242—as well as Section 241—see the table appended to the opinion of Mr. Justice Frankfurter in *United States* v. *Williams*, 341 U.S. at 83.

follow that the absence of a similar restriction in a provision that protects rights secured against all categories of offenders forecloses protection of Fourteenth Amendment rights. The statute need not enumerate those with capacity to violate the Amendment: the Constitution itself does that. Indeed, since the substantive coverage of Section 242 was broadened to include all federal constitutional and statutory rights (see *Screws* v. *United States,* 325 U.S. 91, 120 (concurring opinion of Mr. Justice Rutledge)), the restriction of the provision to offenders wielding State power has become somewhat anomalous. Insofar as Section 242 now punishes invasion of rights also secured against private action (see *United States* v. *Classic,* 313 U.S. 299), there is plainly no constitutional necessity for the restriction and the consequence is that individual offenses against such rights are not federal crimes if no part of a conspiracy. There is certainly no warrant for imputing to the drafters of Section 241 the forced dilemma of covering Fourteenth Amendment rights, if at all, only by restricting their entire provision to State officers.

The upshot is that there is a certain overlapping between the predecessor of Section 241 and the other provisions of the Enforcement Act of 1870—the area of overlapping having increased since the expansion of Section 242. But, as already noted, that is not a sound argument against our reading of Section 241. The fact is that the Act of 1870 is not a symmetrical construction. It is a composite, hastily welded out of disparate pieces, attributable to a variety of spon-

sors, each with his particular concern.[7] As we shall see, Senator Pool, the author of our provision, had perhaps the broadest view and meant to cover all rights against all interference, including those rights recently declared by the Fourteenth Amendment, which he thought Congress might safeguard against both official and unofficial invasion.

2. *"Citizen."* Section 241 punishes only offenses against citizens of the United States. See *Baldwin* v. *Franks,* 120 U.S. 678. Hence, it is argued that the provision is concerned alone with rights appertaining to national citizenship, not including the Fourteenth Amendment rights to due process and equal protec-

[7] Thus, Sections 1–4 of the Act—which are concerned solely with the right to vote—derive from the parent bill reported by the Senate Judiciary Committee as a substitute for other voting measures before the Senate. Cong. Globe, 41st Cong., 2d Sess., pp. 2942, 3479–3480. Sections 16 and 17—which reenacted provisions of the Civil Rights Act of 1866 and ultimately became Section 242 of the Criminal Code—are traceable to an amendment submitted by Senator Stewart of Nevada. *Id.*, p. 3480. And Section 6—now our Section 241—, together with Section 7, was proposed by Senator Pool. *Id.*, pp. 3612, 3679. There were many other amendments, besides. See *id.*, p. 3688 (comment of Senator Trumbull). Just before the bill was finally passed (*id.*, p. 3688), one Senator characterized it as "a conglomeration of incongruities and contradictions" and claimed no one knew its true content in light of the number of amendments hastily adopted (*ibid.*, Senator Thurman). Another member accurately stated: "The bill as it now stands is the child of many fathers. It is a piece of patchwork throughout." *Ibid.* (Senator Casserly). See, also, the opinion of Mr. Justice Frankfurter in *United States* v. *Williams, supra,* at pp. 74–75, and n. 2.

tion which are not derived from citizenship or restricted to citizens. And, again, a contrast is made with Section 242 which, like the Fourteenth Amendment itself, expressly protects every "inhabitant" of the land, citizen or not.

Significantly, this argument has never gained a foothold in this Court. Although the court of appeals, in *Williams*, had stressed the fact that Section 241 protects only the rights of citizens (see 179 F. 2d at 647), nothing was made of the point by Mr. Justice Frankfurter when the case came here. That is doubtless because the argument immediately runs into an insuperable barrier when we notice that, of all the rights held to be protected by Section 241, none is peculiar to citizens. It is so with respect to the right to vote in congressional elections (*Ex parte Yarbrough, supra; Guinn* v. *United States, supra; United States* v. *Mosley, supra; United States* v. *Classic, supra; United States* v. *Saylor, supra*), which is not derived from citizenship or necessarily restricted to citizens. *Minor* v. *Happersett*, 21 Wall. 162; *Pope* v. *Williams*, 193 U.S. 621, 632–633. And the same is true of the right to peaceful enjoyment of federal homesteads (*United States* v. *Waddell, supra*) which were open to aliens who had merely declared their intention to become citizens (Rev. Stat. 2289), of the right to be secure against unauthorized violence when in federal custody (*Logan* v. *United States, supra*), and of the right to inform on violations of the Federal tax

laws (*In re Quarles, supra; Motes* v. *United States, supra*).[8]

We can speculate why Section 241 was written to protect citizens alone. Perhaps there was a conscious purpose to avoid encompassing Indians who were not generally viewed as naturalized by the Fourteenth Amendment. See *Elk* v. *Wilkins*, 112 U.S. 94; James, *The Framing of the Fourteenth Amendment* (1956), p. 143. But, without doubt, the primary focus was on the Negro in the reconstructed States, recently emancipated and now granted citizenship; for that purpose, it was enough to protect all citizens. Section 242, on the other hand, was explicitly written to protect aliens as well as Negro citizens, as the text makes clear. Moreover, in using the word "inhabitant" it was merely tracking the language of the Civil Rights Act of 1866 (14 Stat. 27) which assured the recently emancipated slaves, not yet citizens, some of the same

[8] Mr. Justice Frankfurter's opinion for four members of the Court in *Williams* can be read as characterizing the right to vote in federal elections and the rights vindicated in *Logan*, *Quarles* and *Motes* as rights of national citizenship (see 341 U.S. at 77, 79–80). While that description would not be wholly accurate, the point is not important in light of the explicit recognition that the right involved in *United States* v. *Waddell*, *supra*, "did not pertain to United States citizenship" (*id.* at 80), and the conclusion of the opinion that the category of rights protected by Section 241 are those "arising from the substantive powers of the Federal Government" (*id.* at 73, 77, 78, 79, 82)—rather than only those appertaining to national citizenship. In *United States* v. *Guest*, No. 65, this Term, we note our difficulty with the proposition that the Fourteenth Amendment (and presumably also the Fifteenth) did not—by its Fifth Section—enlarge the "substantive powers" of the national government. See Brief for the United States, pp. 18–46.

rights as were "enjoyed by white citizens". See note 6, *supra*, p. 18. In sum, the substantive coverage of these provisions does not depend on the class of persons protected: just as Section 242 originally secured a narrow group of rights for everyone, Section 241 protects only a limited class (citizens) but with respect to all federal rights.

3. "*[R]ight or privilege [granted or] secured * * * by the Constitution or laws of the United States.*" As originally enacted (as Section 6 of the Act of 1870), Section 241 was directed at the invasion of "any right or privilege granted or secured" to citizens by the federal Constitution or statutes. The word "granted" was dropped four years later when the federal statutes were revised. See Rev. Stat. § 5508. Presumably, this was done on the ground that the word "granted"—at best a mere alternative descriptive separated by a disjunctive—was surplusage, for the "revision" of 1874 was not meant to alter substance. See 14 Stat. 74; 16 Stat. 96. Nevertheless, apparently focusing on that word, and contrasting the present language of Section 242 ("rights, privileges, or immunities secured or protected by the Constitution or laws of the United States"), it has been argued that the "narrow phase" of Section 241 does not cover Fourteenth Amendment rights. See 341 U.S. at 78.

The proposition is difficult to grasp. Insofar as any contrast between the language of Section 241 and Section 242 is appropriate, the argument seems reversed. Indeed, if one or the other of the two provisions must be restricted to rights of national citizenship, an echo of the "privileges or immunities"

clause of the Fourteenth Amendment is more obvious in Section 242 ("rights, privileges, or immunities") than in Section 241 ("right or privilege"). And the absence of the word "granted" in Section 242 and its presence in the predecessor of Section 241 suggests, if anything, that the former provision deals only with pre-existing rights inherent in national citizenship, not conferred by the Fourteenth Amendment, but merely re-affirmed by it and guaranteed (somewhat redundantly) against contrary State laws, whereas the latter section (§ 241) protects the new constitutional rights declared for the first time by the Due Process and Equal Protection Clauses of the Amendment.

But the comparison, in any event, is wholly misleading, for the two texts put in opposition are not of the same date. The phrase "secured or protected" in Section 242 is directly derived from the Civil Rights Act of 1866 (see note 6, *supra*, p. 18) written some years before Section 241. That the rights involved are not described as "granted" may well be due to the fact that there, as well as in the 1870 text, the direct reference was to a previous section of the same statute—not the Constitution—which was viewed as merely implementing rights already conferred by the Thirteenth or Fourteenth Amendment. The rest of the quoted language of Section 242 was substituted in 1874 for a longer and very different phrase of apparently narrower content in the original provision of 1870. See note 6, *supra*, p. 18. And at the same time that new text came into the law the word "granted" was deleted from Section 241.

Plainly nothing can be learned by now comparing the language of two provisions which have wholly different verbal histories.

Comparisons aside, there is nothing in the characterization of the rights protected by Section 241 which excludes the rights to due process and equal protection conferred by the Fourteenth Amendment. To be sure, the Due Process and Equal Protection Clauses did not grant absolute rights, good against the world: the Amendment only deals with the relationship between the inhabitant and the State. But even if they run only against the State, these are nevertheless properly termed "rights," "granted," or at least "secured" by the Constitution. As this Court said in the *Civil Rights Cases,* 109 U.S. 1, 11, "Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment." See, also, *Strauder* v. *West Virginia,* 100 U.S. 303, 307–308; *Ex parte Virginia,* 100 U.S. 339, 345. That this was the usage of the time is illustrated by Section 17 of the 1870 Act (the predecessor of § 242) which referred to the equal protection guarantees enumerated in the previous section as "right[s] secured or protected" by that provision. Note 6, *supra,* p. 18.

B. THE LEGISLATIVE HISTORY OF SECTION 241

We have seen that the most painstaking analysis of the text of Section 241, viewed alone and in the context of the statute where it originated, merely confirms what the language, on its face, indicates: that the provision broadly punishes conspiracies interfering with all federal rights, including those declared by the Fourteenth Amendment. It only re-

mains to notice that the immediate legislative history of Section 241 fully supports that conclusion.

We begin with the seemingly decisive fact that Senator Pool, introducing Section 241 in its original form, explicitly referred to "rights which are conferred upon the citizen by the fourteenth amendment" as among those covered by his provision. Cong. Globe, 41st Cong., 2d Sess. 3611; *id.*, at 3613 (App., *infra*, pp. 43, 48).* There is no explaining away that statement. In context, it is clear that the sponsor of the provision had in mind the rights conferred by the Due Process and Equal Protection Clauses and not, as has been suggested (341 U.S. at 76–77, n. 4), the pre-existing rights of national citizenship available for the first time to those whom the Amendment made citizens and now expressly guaranteed against State invasion by the new Privileges and Immunities Clause. The indications are numerous.

First, Senator Pool expressly invoked the language of the due process and equal protection guarantees of the Amendment. He showed his particular concern with the Equal Protection Clause by stressing the use of the word "deny" in that provision "in contradistinction" to the mere prohibition against a State "making or enforcing laws" abridging the privileges and immunities of national citizenship in the first clause—arguing that here the State's obligation was affirmative and that, in the event of default, con-

*We have reproduced as an appendix (*infra*, pp. 37–50) the whole of Senator Pool's speech introducing the amendment which became Section 6 of the Enforcement Act of 1870, and, ultimately, Section 241 of the Criminal Code. It is the only pertinent text of legislative history.

gressional power was therefore greater. *Id.*, at 3611 (App., *infra*, pp. 40–41). In light of later decisions, beginning with the *Slaughter-House Cases*, 16 Wall. 36, the Senator was of course correct in neglecting the rights "conferred" by the Privileges and Immunities Clause: whatever they are, they pre-existed the Fourteenth Amendment and could be secured against State invasion without benefit of the new Amendment.

Again, in the same passage, Senator Pool makes repeated reference to the Civil Rights Act of 1866 and indicates that those rights, among others, are those which his measure will protect. *Ibid.* As we know, those are basically equal protection rights, now vindicated (along with rights derived from the Due Process Clause of the Fourteenth Amendment and others) by Section 242.

Finally, the sponsor's purpose to protect the right secured by the Fifteenth Amendment against the action of hostile conspiracies is unmistakable. *Ibid.* (App., *infra*, pp. 40–43). Yet, that right is no more a right "appertaining to national citizenship" or one derived "from the substantive powers of the federal government" than are those secured by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Having strayed so far from the narrow category of rights it is said he was concerned with, it seems highly unlikely that the sponsor should have stopped short of including all Fourteenth Amendment rights—which he mentions in one breath with the right secured by the Fifteenth Amendment. *Id.*, at 3611, 3613 (App., *infra*, pp. 40, 43, 48).

To be sure, Senator Pool believed the rights protected by his bill could be secured against private in-

terference as well as State denial. *Id.* at 3611–3613 (App., *infra,* pp. 38–49). But that does not tend to indicate that he meant to exclude rights derived from those constitutional provisions which are explicitly directed to States alone. As we have noted, he meant to cover the right guaranteed by the Fifteenth Amendment which presents the identical problem. See *James* v. *Bowman,* 190 U.S. 127. Plainly, he thought that Congress might legislate to protect Fourteenth and Fifteenth Amendment rights against the action of private conspiracies whenever the State had failed ot effectively secure those rights. We advance a like contention in *United States* v. *Guest,* No. 65, this Term. Whether he was right or wrong, however, does not matter here. The provision enacted is carefully limited to "rights secured by the Constitution"; its scope is measured by the constitutional provision involved. As Mr. Justice Holmes noted in *United States* v. *Mosley, supra,* 238 U.S. at 387, here "Congress put forth all its powers"; it meant to afford all possible protection but it was careful not to overstep the constitutional line, wherever it might later be drawn.

## II

### SECTION 242 OF THE CRIMINAL CODE REACHES PRIVATE INDIVIDUALS WHO ACT IN ASSOCIATION WITH STATE OFFICERS TO CARRY OUT A SCHEME TO INVADE RIGHTS SECURED BY THE PROVISION.

As we have already noted, the two indictments before the Court clearly charge violations of specific rights guaranteed by the Fourteenth Amendment. It is settled that such conduct "under color of law," if

done willfully as here alleged, contravenes Section 242 of the Criminal Code. *Screws* v. *United States,* 325 U.S. 91; *Williams* v. *United States,* 341 U.S. 97. Accordingly, the court below sustained the indictment in No. 60 with respect to the defendants who hold State office and were alleged to be acting officially (albeit illegally). But—while upholding as to all the charge of conspiring to violate Section 242—the court dismissed the substantive charges against the private defendants on the ground that they lacked capacity to commit the offense defined by Section 242. We think the ruling erroneous, first, because, in the circumstances alleged, the private defendants, although not State officials, were acting "under color of law" within the meaning of the statute; and, second, because, regardless of their capacity to themselves commit the offense, they are amenable to Section 242 as aiders and abettors of the State officials charged.

A. The trial judge correctly observed that the indictment in No. 60 does not claim that fourteen of the defendants were public officials of the State of Mississippi, de jure or de facto. On the other hand, the substantive counts (R. 13–16) explicitly charge that each of the defendants, including those who held no official position, were "acting under color of the laws of the State of Mississippi," and the indictment, as a whole, alleges that all of them were joint conspirators, the private defendants acting in close association with those who were law enforcement officers, one of whom was present at all times and presumably lent the protective umbrella of his office to all that

was done. Thus, it is apparent that the court below held that private persons are never amenable to the sanctions of Section 242, no matter what the circumstances. Otherwise, the allegation of action "under color of law", in the language of the statute, should have required upholding the charge. In effect, the ruling is that none but State officers can act "under color of law" within the meaning of Section 242. The proposition, we submit, is untenable.

Certainly, nothing in the nature of the rights protected by Section 242 requires confining its reach to State officers in all circumstances. Indeed, it has long been settled that the conduct of private persons may be subject to the prohibitions of the Fourteenth Amendment if the State, through its officers, "has so far insinuated itself into a position of interdependence * * * that it must be recognized as a joint participant in the challenged activity." *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 725. There are many variations, *E.g., Pennsylvania* v. *Board of Trusts,* 353 U.S. 230; *Peterson* v. *City of Greenville,* 373 U.S. 244; *Lombard* v. *Louisiana,* 373 U.S. 267; *Griffin* v. *Maryland,* 378 U.S. 130; *Robinson* v. *Florida,* 378 U.S. 153. But the basic situation is always the same: a private activity falls within the scope of the Fourteenth Amendment because—albeit without assuming full official status or altogether losing its private character—it becomes involved in a "joint venture" of sorts with the State. That is our case.

If the scope of action "under color of law" is coextensive with "State action" under the Fourteenth

Amendment—as is usually tacitly assumed [10]—the decisions just cited end the question. But there are, in any event, like rulings construing the phrase "under color of law" in 18 U.S.C. 242 or its civil counterpart, 42 U.S.C. 1983—where it has the same meaning. *Monroe* v. *Pape,* 365 U.S. 167, 185. Thus, in *Baldwin* v. *Morgan,* 251 F. 2d 780, 788 (C.A. 5), the court rejected a claim that private persons were not acting "under color of any law" in these words:

> State action is indeed required under the Fourteenth Amendment and 42 U.S.C.A. § 1983. But those who directly assist the admitted state agency in carrying out the unlawful action become a part of and subject to the sanction of Section 1983. * * *

See, also, *Smith* v. *Holiday Inns of America,* 336 F. 2d 630 (C.A. 6); *Hampton* v. *City of Jacksonville,* 304 F. 2d 320 (C.A. 5); *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F. 2d 959 (C.A. 4); *Valle* v. *Stengel,* 176 F. 2d 697 (C.A. 3).

[10] Thus, most of the modern cases construing the Fourteenth Amendment were filed under 28 U.S.C. 1343(3) which gives the district courts jurisdiction of civil cases to redress deprivation of constitutional rights "under color of any State law, statute, ordinance, regulation, custom or usage," and the injunction was sought and granted under 42 U.S.C. 1983 which provides for equitable relief from a deprivation of constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." See, *e.g.*, *Turner* v. *City of Memphis,* 369 U.S. 350, 351; *McNeese* v. *Board of Education,* 373 U.S. 668, 671; *Reynolds* v. *Sims,* 377 U.S. 533, 537. The assumption apparently indulged is that whatever violates the Amendment necessarily was done "under color of law."

Closest in point, perhaps, is *United States* v. *Lynch*, 94 F. Supp. 1011 (N.D. Ga.), affirmed, 189 F. 2d 476 (C.A. 5), certiorari denied, 342 U.S. 831, a case strikingly similar to ours. There, it was charged that a sheriff and his deputy arrested several persons and "turn[ed] them over to a hooded group in disguise to be beaten." On these facts the court held:

> While it is true that one must be acting under color of state law in order to violate Section 242, and that ordinarily a private citizen would not act under color of law, it is also true that the presence of state officers and their active participation with other defendants who were not officers would furnish the "color of law" required as to all the defendants. [94 F. Supp. at 1014.][11]

We conclude, as in *Lynch*, that when the private members of the mob knowingly linked hands with the officers to carry out a common plan to deprive Schwerner, Goodman and Chaney of their constitutional rights they lost their claim to be treated as mere private citizens. Having united with State officials and invoked the protective umbrella of their presence, the private defendants were acting "under color of law" and became amenable to the sanctions of Section 242.

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[11] See, also, *Downie* v. *Powers*, 193 F. 2d 760 (C.A. 10), where the court held that "* * * a wilful or purposeful failure of the Chief of Police or other City officials to preserve order, keep the peace, and to make the Jehovah's Witnesses secure in their right to peaceably assemble, would undoubtedly constitute acquiescence in, and give color of law to, the actions of the mob." 193 F. 2d at 764. And see *Williams* v. *United States*, 179 F. 2d 656 (C.A. 5), affirmed, 341 U.S. 97.

B. In addition, the substantive charges against the private defendants should have been sustained on the ground that they may have been aiders and abettors of the State officers jointly indicted. While that relationship is suggested by the language of indictment, it is true that the private defendants are formally charged as principals, as themselves acting "under color of the laws of the State of Mississippi." But, as already noted (note 4, *supra*, p. 9), indictment as a principal is no bar to conviction as an aider or abettor (which, in turn, permits punishment as a principal).[12]

The governing principle that one without capacity to commit an offense may nevertheless be convicted if he aided and abetted its commission is well settled. The rule is embodied in 18 U.S.C. 2(a) which provides that "[w]hoever * * * aids, abets, counsels, commands, induces, or procures [the] commission [of an offense against the United States] is punishable as a principal." Whatever doubt there may have been that persons lacking capacity to commit the substantive offense were covered was removed in 1951 when the

[12] See, in addition to the authorities cited at note 4, *supra*, p. 9, *United States* v. *Russo*, 284 F. 2d 539 (C.A. 2); *Swanne Soon Young Pang* v. *United States*, 209 F. 2d 245 (C.A. 9); *United States* v. *Knickerbocker Fur Coat Co.*, 66 F. 2d 388 (C.A. 2); *Melling* v. *United States*, 25 F. 2d 92 (C.A. 7); *DiPreta* v. *United States*, 270 Fed. 73 (C.A. 2); *Vane* v. *United States*, 254 Fed. 32 (C.A. 9); *United States* v. *Snyder*, 14 Fed. 554 (D. Minn.); *United States* v. *Palermo*, 172 F. Supp. 183 (E.D. N.Y.); *United States* v. *J. R. Watkins Co.*, 127 F. Supp. 97 (D. Minn.); *United States* v. *Selph*, 82 F. Supp. 56 (S.D. Cal.); *United States* v. *Decker*, 51 F. Supp. 20 (D. Md.).

aider and abettor statute was amended to read as it does now. The report accompanying that legislation (S. Rep. No. 1020, 82d Cong., 1st Sess., p. 7) explicitly states:

> This section is intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted. * * *

The judicial decisions are in accord. See *Wilson* v. *United States,* 230 F. 2d 521, (C.A. 4); *Koehler* v. *United States,* 189 F. 2d 711, (C.A. 5); *May* v. *United States,* 175 F. 2d 994 (C.A. D.C.); *Haggerty* v. *United States,* 5 F. 2d 224 (C.A. 7); *Barron* v. *United States,* 5 F. 2d 799, (C.A. 1); *United States* v. *Snyder,* 14 Fed. 554 (D. Minn.); *United States* v. *Melekh,* 193 F. Supp. 586, (N.D. Ill.); *United States* v. *Bayer,* 4 Dill. 407, 24 Fed. Cas. 1046 (D. Minn.). The *Wilson* and *Snyder* cases make it clear that the rule applies when the aider and abettor is incapable of committing the offense because he is not acting "officially" or does not hold the described public office. Thus, in *Wilson,* the statute (now 18 U.S.C. 201) reached only the solicitation or acceptance of bribes by a government officer acting in his "official capacity" and the court sustained the conviction of one who claimed not to be so acting on the alternative ground that he was, in any event, punishable as an aider or abettor. And in *Snyder,* a co-defendant who was not himself a postmaster but had aided and abetted the postmaster was held accountable under a statute that punished "[a]ny post-

master who shall make a false return to the auditor for the purpose of fraudulently increasing his compensation."

The same rule applies with respect to Section 242. Thus, in *Koehler* v. *United States, supra,* a State officer and one Ackermann, who was a private individual,[13] were jointly indicted for violating Section 242 and the court sustained Ackermann's conviction for having "aided, abetted and counseled Koehler in the commission of this offense", finding that the "evidence conclusively reveals that Ackermann and Koehler were acting in concert in perpetrating the offense" and that Ackermann was "assisting" Koehler. 189 F. 2d at 712–714. Likewise, in *United States* v. *Lynch,* 94 F. Supp. 1011 (N.D. Ga.), affirmed, 189 F. 2d 476 (C.A. 5), certiorari denied, 342 U.S. 831, some of the defendants were police officials and others were private citizens. In answer to the private defendants' argument that they could not violate Section 242 "because it related only to deprivations by a state," the district court ruled (94 F. Supp. at 1013):

> True, Section 242 was enacted pursuant to the Fourteenth Amendment and relates to deprivations by states (acting through state officials) and not to acts of private individuals. It does

[13] Although the *Koehler* opinion itself does not explicitly state that Ackermann was a private person, a subsequent opinion of the same court describes the *Koehler* case as one "in which a private citizen assisted a constable in a brutal assault and unlawful imprisonment * * *" *Baldwin* v. *Morgan,* 251 F. 2d 780, 789 (C.A. 5). Thus the court below was in error when, in referring to the *Koehler* case, it stated that "Ackermann was not a mere private citizen * * *" (R. 21).

not follow, however, that private individuals cannot be guilty as principals if they aid and abet state officers in such violations. Section 2, Title 18, United States Code Annotated.

## CONCLUSION

For the foregoing reasons, the judgments of the district court dismissing the indictment in No. 59 in its entirety and parts of three counts of the indictment in No. 60 should be reversed and the causes remanded for trial.

Respectfully submitted.

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# APPENDIX

**Remarks of Senator Pool of North Carolina on sponsoring Sections 5, 6 and 7 of the Enforcement Act of 1870 (Cong. Globe, 41st Cong., 2d Sess., pp. 3611–3613).**

Mr. POOL. Mr. President, the question involved in the proposition now before the Senate is one in which my section of the Union is particularly interested; although since the ratification of the fifteenth amendment, which we are now about to enforce by appropriate legislation, other sections of the country have become more or less interested in the same question. It is entering upon a new phase of reconstruction; that is, to enforce by appropriate legislation those great principles upon which the reconstruction policy of Congress was based.

I said upon a former occasion on this floor that the reconstruction policy of Congress had been progressive, and that it was necessary that it should be progressive still. The mere act of establishing governments in the recently insurgent States was one thing; the great principles upon which Congress proposed to proceed in establishing those governments was quite another thing, involving principles which lie at the very foundation of all that has been done, and which are intimately connected with all the results that must follow from that and from the legislation of Congress connected with the whole subject.

Mr. President, the first thing that was done was the passage of the thirteenth amendment, by which slavery in the United States was abolished. By that four millions of people

were taken out from under the protecting hand of interested masters and turned loose to take care of themselves. They were turned loose and put upon their own resources in communities which were imbued with prejudices against them as a race, communities which for the most part had for years past—indeed from the very time when those who are now in existence were born—been taught and had instilled into them a prejudice against the equality which has been attempted to be established for the colored citizens of the United States.

Mr. President, the condition which that thirteenth amendment imposed on the late insurrectionary States was one which demanded the serious consideration and attention of this Government. The equality which by the thirteenth, fourteenth, and fifteenth amendments has been attempted to be secured for the colored men, has not only subjected them to the operation of the prejudices which had theretofore existed, but it has raised against them still stronger prejudices and stronger feelings in order to fight down the equality by which it is claimed they are to control the legislation of that section of the country. They were turned loose among those people, weak, ignorant, and poor. Those among the white citizens there who have sought to maintain the rights which you have thrown upon that class of people, have to endure every species of proscription, of opposition, and of vituperation in order to carry out the policy of Congress, in order to lift up and to uphold the rights which you have conferred upon that class. It is for that reason not only necessary for the freedmen, but it is necessary for the white people of that section that there should be stringent and effective legislation on the part of Congress in regard to these measures of reconstruction.

We have heard on former occasions on the floor of the Senate that there were organizations which committed outrages, which went through communities for the purposes, of intimidating and coersing classes of citizens in the exercise of their rights. We have been told here that perhaps it might be well that retaliation should be resorted to on the part of those who are oppressed. Sir, the time will come when retaliation will be resorted to unless the Government of the United States interposes to command and to maintain the peace; when there will be retaliation and civil war; when there will be bloodshed and tumult in various communities and sections. It is not only necessary for the freedmen, but it is important to the white people of the southern section, that by plain and stringent laws the United States should interpose and preserve the peace and quiet of the community.

The fifteenth amendment to the Constitution of the United States provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State on account of race, color, or previous condition of servitude. It speaks of "the right of citizens to vote." It has been said that voting is a privilege; but this amendment recognizes it as a right in the citizen; and this right is not to "be denied or abridged by the United States, or by any State." What are we to understand by that? Can individuals abridge it with impunity? Is there no power in this Government to prevent individuals or associations of individuals from abridging or contravening that provision of the Constitution? If that be so, legislation is unnecessary. If our legislation is to apply only to the States, it is perfectly clear that it is totally unnecessary, inasmuch as we cannot pass a criminal law as applicable to a State; nor can we indict a State officer as an officer. It must ap-

ply to individuals. A State might attempt to contravene that provision of the Constitution by passing some positive enactment by which it would be contravened, but the Supreme Court would hold such enactment to be unconstitutional, and in that way the State would be restrained. But the word "deny" is used. There are various ways in which a State may prevent the full operation of this constitutional amendment. It cannot—because the courts would prevent it—by positive legislation, but by acts of omission it may practically deny the right. The legislation of Congress must be to supply acts of omission on the part of the States. If a State shall not enforce its laws by which private individuals shall be prevented by force from contravening the rights of the citizen under the amendment, it is in my judgment the duty of the United States Government to supply that omission, and by its own laws and by its own courts to go into the States for the purpose of giving the amendment vitality there.

The word "deny" is used not only in this fifteenth amendment, but I perceive in the fourteenth amendment it is also used. When the fourteenth amendment was passed there was in existence what is known as the civil rights bill, a part of which has been copied in the Senate bill now pending. The civil rights bill recognized all persons born or naturalized in the United States as citizens, and provided that they should have certain rights which were enumerated. They are, "to make and enforce contracts, to sue, be made parties, give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property," and to "the full and equal benefit of all laws and proceedings for the security of person and property."

The civil rights bill was to be enforced by making it criminal for any officer, under color of any State law, "to subject, or cause to be

subjected, any citizen to the deprivation of any of the rights secured and protected" by the act. If an officer of any State were indicted for subjecting a citizen to the deprivation of any of those rights he was not to be indicted as an officer; it was as an individual. And so, under the fourteenth amendment to the Constitution, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." There the word "deny" is used again; it is used in contradistinction to the first clause, which says, "No State shall make or enforce any law" which shall do so and so. That would be a positive act which would contravene the right of a citizen; but to say that it shall not deny to any person the equal protection of the law it seems to me opens up a different branch of the subject. It shall not deny by acts of omission, by a failure to prevent its own citizens from depriving by force any of their fellow-citizens of these rights. It is only when a State omits to carry into effect the provisions of the civil rights act, and to secure the citizens in their rights, that the provisions of the fifth section of the fourteenth amendment would be called into operation, which is, "that Congress shall enforce by appropriate legislation the provisions of this article."

There is no legislation that could reach a State to prevent its passing a law. It can only reach the individual citizens of the State in the enforcement of law. You have, therefore, in any appropriate legislation, to act on the citizen, not on the State. If you pass an act by which you make it an indictable offense for an officer to execute any law of a State by

which he trespasses upon any of these rights of the citizen it operates upon him as a citizen, and not as an officer. Why can you not just as well extend it to any other citizen of the country?

It is, in my judgment, incumbent upon Congress to pass the most stringent legislation on this subject. I believe that we have a perfect right under the Constitution of the United States, not only under these three amendments, but under the general scope and features and spirit of the Constitution itself, to go into any of these States for the purpose of protecting and securing liberty. I admit that when you go there for the purpose of restraining liberty, you can go only under delegated powers in express terms; but to go into the States for the purpose of securing and protecting the liberty of the citizen and the rights and immunities of American citizenship is in accordance with the spirit and whole object of the formation of the Union and the national Government.

There are, Mr. President, various ways in which the right secured by the fifteenth amendment may be abridged by citizens in a State. If a State should undertake by positive enactment, as I have said, to abridge the right of suffrage, the courts of the country would prevent it; and I find that in section two of the bill which has been proposed as a substitute by the Judiciary Committee of the Senate provision is made for cases where officers charged with registration or officers charged with the assessment of taxes and with making the proper entries in connection therewith, shall refuse the right to register or to pay taxes to a citizen. I believe the language of the Senate bill is sufficiently large and comprehensive to embrace any other class of officers that might be charged with any act that was necessary to enable a citizen to perform any prerequisite to voting.

But, sir, individuals may prevent the exercise of the right of suffrage; individuals may prevent the enjoyment of other rights which are conferred upon the citizen by the fourteenth amendment, as well as trespass upon the right conferred by the fifteenth. Not only citizens, but organizations of citizens, conspiracies, may be and are, as we are told, in some of the States formed for that purpose. I see in the fourth section of the Senate bill a provision for cases where citizens by threats, intimidation, bribery, or otherwise prevent, delay, or hinder the exercise of this right; but there is nothing here that strikes at organizations of individuals, at conspiracies for that purpose. I believe that any bill will be defective which does not make it a highly penal offense for men to conspire together, to organize themselves into bodies, for the express purpose of contravening the right conferred by the fifteenth amendment.

But, sir, there is a great, important omission in this bill as well as in that of the House. It seems not to have struck those who drew either of the two bills that the prevention of the exercise of the right of suffrage was not the only or the main trouble that we have upon our hands. Suppose there shall be an organization of individuals, or, if you please, a single individual, who shall take it upon himself to compel his fellow citizens to vote in a particular way. Suppose he threatens to discharge them from employment, to bring upon them the outrages which are being perpetrated by the Kuklux organizations, so as not to prevent their voting, but to compel them to vote in accordance with the dictates of the party who brings this coercion upon them. It seems to me it is necessary that we should legislate against that. That is a more threatening view of the subject than the mere preventing of registration or of entering men's names upon the assessment books for taxation or of depositing the ballot in

the box. I think the bill cannot be perfected to meet the emergencies of the occasion unless there be a section which meets that view of the case.

The Senator from Indiana [Mr. Morton] asks whether I have drawn an amendment to that effect. I have, but I cannot offer it at this time, for the simple reason that there is an amendment to an amendment pending.

Mr. MORTON. Let it be read for information.

Mr. POOL. It has been printed, and I send it to the desk to be read for information.

The Chief Clerk read the amendment intended to be proposed by Mr. Pool, as follows:

"Insert after section four of the Senate bill the following sections:

"SEC. 5. *And be it further enacted,* That it shall be unlawful for any person, with intent to hinder or influence the exercise of the right of suffrage as aforesaid, to coerce or intimidate, or attempt to coerce or intimidate any of the legally qualified voters in any State or Territory. Any person violating the provisions of this section shall be held guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned, or both, in the discretion of the court: the fine not to exceed $1,000, and the imprisonment not to exceed one year.

SEC. 6. *And be it further enacted,* That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, such person shall be held guilty of felony, and on conviction thereof shall be fined and imprisoned; the fine not to exceed $5,000 and the imprisonment not to exceed ten

years; and shall, moreover, be thereafter ineligible to and disabled from holding any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

SEC. 7. *And be it further enacted,* That if in the act of violating any provision in either of the two preceding sections, any other felony, crime, or misdemeanor shall be committed, the offender may be indicted or prosecuted for the same in the courts of the United States, as hereinafter provided, for violations of this act, and on conviction thereof shall be punished for the same with such punishments as are attached to like felonies, crimes, and misdemeanors by the laws of the State in which the offense may be committed.

"Strike out section twelve and substitute therefor the following:

"*And be it further enacted,* That the President of the United States, or such person as he may empower for that purpose, may employ in any State such part of the land and naval forces of the United States, or of the militia, as he may deem necessary to enforce the complete execution of this act; and with such forces may pursue, arrest, and hold for trial all persons charged with the violation of any of the provisions of this act, and enforce the attendance of witnesses upon the examination or trial of such persons."

* * * * *

Mr. POOL. The Senator from Indiana asked if I had an amendment prepared which met the view of the case I was presenting in regard to the compelling of citizens to vote in a particular way. The first section of the amendment which I have offered uses this language:

"That it shall be unlawful for any person with intent to hinder or influence the exercise of the right of suffrage as aforesaid, to coerce or intimidate or attempt to coerce or intimidate

any of the legally qualified voters in any State or Territory."

But, Mr. President, there is another view which seems to have been lost sight of entirely by those who have drawn both the House bill and the bill now pending before the Senate, and from which we apprehend very much danger. It is this: the oppression of citizens because of having voted in a particular way, or having voted at all. It may often happen, as it has happened up to this time already, that upon the close of an election colored persons will be discharged from employment by their employers. They may be subjected to outrages of various kinds because they have participated in an election, and cast their votes in a particular way. That is not done for the purpose of punishment so much as for the purpose of deterring them from voting in any succeeding election, or from voting in a way that those who perpetrate these outrages do not desire them to do. I find that branch of the subject is entirely left out of view in the bill.

There is another feature of my amendment which I deem of some importance. It is this:

"That if in the act of violating any provision in either of the two preceding sections any other felony, crime, or misdemeanor shall be committed, the offender may be indicted or prosecuted for the same in the courts of the United States."

I think the most effective mode of preventing this intimidation and these attempts at coercion, as well as the outrages which grow out of these attempts, would be found in making any offense committed in the effort to violate them indictable before the courts of the United States. As was said before, in the discussion of the Georgia question in the Senate, the juries in the communities where these outrages are committed are often composed of men who are engaged in them, or of their friends, or of those

who connive at them, or of persons who are intimidated by them, and in many instances they dare not bring in a true bill when there is an attempt to indict, or if a true bill be found, they dare not go for conviction on the final trial. It is for that reason that I believe it will be better, it will be the only effective remedy, to take such offenders before the courts of the United States, and there have them tried by a jury which is not imbued with the prejudices and interests of those who perpetrate the crimes.

These are the principal features of the amendment which I have drawn in the effort to perfect this bill; and there is another one to which I will call the attention of the Senate. It is that in regard to calling out the military forces of the United States. I find that in the civil rights bill, as in the bill which has been introduced by the Senate Judiciary Committee, the President is authorized, either by himself or by such person as he may empower for that purpose, to use the military forces of the United States to enforce the act. There in both instances it stops. It has been objected to here that the expression, "or such other person as he may empower for that purpose," should not be in the bill; that it may be subject to abuse. I think it would have no good effect to keep that language in. The President may send his officers and he may empower whomsoever he pleases to take charge of his forces without any such provision.

But there is a use for these forces which seems not to have been averted to in either the civil rights bill or in the bill that is now pending before the Senate. It is the holding of these offenders for examination and trial after they are arrested. Their confederates, if they are put in the common prison of the State, will in nine cases out of ten release them. But more important still is it to use these forces to com-

pel the attendance of witnesses; for a subterfuge resorted to is to keep witnesses away from the trial. In many instances witnesses are more or less implicated in the commission of the offense. In other cases the witnesses are intimidated and cannot be obtained upon the trial. So in the amendment which I have prepared I have proposed that these forces may be used to enforce the attendance of witnesses both upon the examination and the trial. My purpose in introducing this was to perfect the Senate bill. I think, as I said yesterday, that that bill is liable to less objection than the House bill. I think it is more efficacious in its provisions. I think it is better that the Senate should direct its attention to perfecting that bill, in order that it may be made, when perfected, a substitute for the bill that came from the House.

That much being said upon the purpose of perfecting the bill and making it efficacious, I have very little more to say. I did not intend when I rose to say much upon the general power, which has been questioned here, to pass any law at all. I think it is better to do nothing than to do that which will not have the proper effect. To do that which will not accomplish the purpose would be worse than doing nothing at all. That the United States Government has the right to go into the States and enforce the fourteenth and the fifteenth amendments is, in my judgment, perfectly clear, by appropriate legislation that shall bear upon individuals. I cannot see that it would be possible for appropriate legislation to be restored to except as applicable to individuals who violate or attempt to violate these provisions. Certainly we cannot legislate here against States. As I said a few moments ago, it is upon individuals that we must press our legislation. It matters not whether those individuals be officers or whether they are acting upon

their own responsibility; whether they are acting singly or in organizations. If there is to be appropriate legislation at all, it must be that which applies to individuals.

I believe that the United States has the right, and that it is an incumbent duty upon it, to go into the States to enforce the rights of the citizens against all who attempt to infringe upon those rights when they are recognized and secured by the Constitution of the country. If we do not possess that right the danger to the liberty of the citizen is great indeed in many parts of this Union. I think this question will come time and again as years pass by, perhaps before another year, in different forms before the Senate. It is well that we should deal with it now and deal with it squarely, and I hope that the Senate will not hesitate in doing so.

Mr. President, the liberty of a citizen of the United States, the prerogatives, the rights, and the immunities of American citizenship, shoud not be and cannot be safely left to the mere caprice of States either in the passage of laws or in the withholding of that protection which any emergency may require. If a State by omission neglects to give to every citizen within its borders a free, fair, and full exercise and enjoyment of his rights it is the duty of the United States Government to go into the State, and by its strong arm to see that he does have the full and free enjoyment of those rights.

Upon that ground the Republican party must stand in carrying into effect the reconstruction policy, or the whole fabric of reconstruction, with all the principles connected with it, amounts to nothing at all; and in the end it will topple and fall unless it can be enforced by the appropriate legislation, the power to enact which has been provided in each one of the great charters of liberty which that party has put forth in its amendments to the Con-

stitution. Unless the right to enforce it by appropriate legislation is enforced stringently and to the point, it is clear to my mind that there will be no efficacy whatever in what has been done up to this time to carry out and to establish that policy.

I did not rise, sir, for the purpose of arguing the question very much in detail. I did not rise for the purpose of making any appeals to the Senate; but more for the purpose of asserting here and arguing for a moment the general doctrine of the right of the United States to intervene against individuals in the States who attempt to contravene the amendment to the Constitution which we are now endeavoring to enforce, and for the purpose of calling attention to the defects in the bill and offering a remedy for them.

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